No. 97-1252

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JANET RENO, Attorney General, *et al.*,
Petitioners,

v.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, THE JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS, THE JEWISH POLICY CENTER, AND REP. GERALD SOLOMON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the courts below had jurisdiction to entertain, prior to the entry of a final order of deportation, a challenge to deportation proceedings initiated against Respondents, where Respondents contend that continuation of those proceedings will chill their First Amendment rights.

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared before this Court as well as other federal courts to ensure that aliens who engage in terrorism or other criminal activities are not permitted to pursue their criminal goals while in this country. *See, e.g., Ogbomon v. United States,* 117 S. Ct. 725 (1997); *Immigration and Naturalization Service v. Elramly,* 117 S. Ct. 31 (1996); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988). WLF filed a brief in support of granting the petition for a writ of certiorari in this case.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Jewish Institute for National Security Affairs (JINSA) is a nonprofit, nonpartisan educational organization committed to explaining the need for a prudent national security policy to the U.S., addressing the security requirements of both the U.S. and the State of Israel, and strengthening the strategic cooperative relationship between these two democracies. Founded as a result of the lessons

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

learned from the 1973 Yom Kippur War, JINSA communicates with the national security establishment and the general public to explain the role Israel can and does play in bolstering American interests, as well as the link between American defense policy and the security of Israel.

The Jewish Policy Center is a § 501(c)(3) organization dedicated to creating, articulating, examining, and advocating conservative approaches to social, economic, and foreign policy issues from the perspective of the Jewish community. By providing a particularly Jewish insight, the JPC hopes to make a unique and valuable contribution to the ongoing policy debates affecting our community, our country, and our world.

U.S. Representative Gerald Solomon is Chairman of the House Rules Committee. As a Member of the House of Representatives, Rep. Solomon strongly supported adoption of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208. Among other things, IIRIRA was intended to streamline deportation proceedings by preventing judicial interference with ongoing proceedings. Rep. Solomon believes that the decision below, by permitting Respondents to litigate their constitutional claims in advance of entry of a final order of deportation, subverts the intent of IIRIRA.

The Popular Front for the Liberation of Palestine has been determined by Secretary of State Madeleine Albright to be a "foreign terrorist organization." The United States has a vital interest in taking strong measures to combat international terrorists who threaten our national security. *Amici* believe that one effective measure is denying American fundraising sources to such organizations. But such

measures are effective only if swiftly implemented. They cannot be effective if those targeted for deportation are permitted, as here, to drag out the deportation process for more than a decade by maintaining collateral federal-court challenges to deportation proceedings.

Amici submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement contained in Petitioners' brief.

In brief, the federal government has been attempting since 1987 to deport eight aliens because they have engaged in fundraising for the Popular Front for the Liberation of Palestine (PFLP), a terrorist organization that has proclaimed the United States to be one of its principal enemies. The federal government has been unable to go forward with those proceedings, however, due to an injunction issued by the United States District Court for the Central District of California.

At the time that deportation proceedings were initiated in January 1987, two of the eight Respondents (Khader Hamide and Michel Shehadeh) were permanent resident aliens; the other six were in this country under temporary visas. Two of those six (Aiad Barakat and Naim Sharif) recently were granted temporary resident status pursuant to 8 U.S.C. § 1255a; the other four (Julie Mungai, Amjad Obeid, Oyman Obeid, and Bashar Amer) concede that their

continued presence in this country violates the terms of their temporary visas, which have long since expired.

The four non-resident aliens are alleged to be deportable on the ground that they failed to maintain student status (8 U.S.C. § 1251(a)(9)), worked without authorization, or overstayed a visit (8 U.S.C. § 1251(a)(2)). *See* Petition Appendix ("Pet. App.") 79a-81a. The two permanent resident aliens (Hamide and Shehadeh) initially were alleged to be deportable under 8 U.S.C. § 1251(a)(6)(F)(iii) (1982) as "members of . . . [an] organization that advocates or teaches . . . the unlawful damage, injury, or destruction of property." Following revision of the immigration laws in 1990, the Immigration and Naturalization Service (INS) added charges against Hamide and Shehadeh under 8 U.S.C. § 1227(a)(4)(B), which renders deportable any alien who "at any time after entry engages in terrorist activity."[2] The two temporary resident aliens (Barakat and Sharif) were alleged to be deportable for visa violations. Pet. App. 3a-4a. The federal government concedes that, as a result of their recent receipt of temporary resident status, Barakat and Sharif are no longer subject to deportation on the visa violation charges (Pet. at 7 n.4), and there are no other charges currently pending against those two.

Respondents filed suit in federal district court in April 1987, seeking an injunction against the deportation pro-

[2] The term "engage in terrorist activity" is defined under 8 U.S.C. § 1182(a)(3)(B)(iii) to include committing "an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity," including "[t]he soliciting of funds or other things of value for terrorist activity or for any terrorist organization."

ceedings. They claimed that basing deportation on their fundraising activities for the PFLP violated their rights under the First Amendment. They also claimed that *all* of the charges (including those alleging visa violations) infringed on their constitutional rights against "selective enforcement" because the charges allegedly were filed in retaliation for their association with the PFLP. Pet. App. 5a.

The district court issued a preliminary injunction in 1994, barring further deportation proceedings based on the visa violation charges against the non-resident alien Respondents. Pet. App. 138a-150a. It found that those Respondents were likely to succeed on their selective prosecution claims, because they had demonstrated that the INS had not brought similar deportation proceedings against those associated with terrorist groups whose views the federal government endorses or tolerates. *Id.* The U.S. Court of Appeals for the Ninth Circuit affirmed the injunction, but reversed the district court's ruling that it lacked jurisdiction over the claims of the two permanent resident aliens (Hamide and Shehadeh). Pet. App. 77a-128a ("*American-Arab I*").

On remand, Petitioners offered extensive additional evidence to the district court regarding the extent of Respondents' fundraising activities for the PFLP and the widespread nature of the PFLP's terroristic activities. The district court nonetheless refused to dissolve the existing injunction and broadened it to include a prohibition of proceedings against Respondents Hamide and Shehadeh. Pet. App. 44a-76a.

While the government's appeal from the district court injunction was pending, Congress adopted the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, Div. C, 110 Stat. 3009. IIRIRA amended 8 U.S.C. § 1252(g) to impose strict limits on federal court review of non-final INS actions.

Based on § 1252(g), the government filed a motion in 1996 in the district court to dismiss the suit and to vacate the injunction. The district court denied the motion, finding that § 1252(g) did not apply to First Amendment claims such as those being raised by Respondents. Pet. App. 22a-44a.

In July 1997, the Ninth Circuit affirmed both the district court's decision on jurisdiction and its decision to keep the injunction in place. Pet. App. 1a-21a.

The Ninth Circuit acknowledged that § 1252(g) applied retroactively to cases, such as Respondents', that were pending on the date of IIRIRA's adoption. Pet. App. 7a-8a. The court noted, however, that § 1252(g) explicitly contemplates exceptions to its ban on federal court jurisdiction,[3] and it held that this case fell within one of those exceptions -- the one allegedly created by 8 U.S.C. § 1252(f). The appeals court noted that § 1252(f) prohibits any court other than the Supreme Court from issuing injunctions against "the operation of [relevant provisions of the Immigration and Naturalization Act] . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." The appeals court held that the last clause of § 1252(f) permits individual aliens such as Respondents to seek judicial review of on-going deportation proceedings, at

[3] The appeals court was referring to the first clause of § 1252(g), which states, "Except as provided in this section . . ."

least to the extent that the individual aliens are raising constitutional claims. Pet. App. 9a-11a.

The Ninth Circuit held that any other interpretation of § 1252 "would present serious constitutional problems." Pet. App. 12a. The court held that Respondents, if forced to await completion of deportation proceedings before turning to the federal courts, would not be able obtain satisfactory review of their selective enforcement claims. The court noted that the none of the administrative bodies within the INS has authority to consider a selective enforcement claim during deportation proceedings, and stated that a federal appeals court reviewing a final order of deportation would lack the factual record necessary to adjudicate such a claim. *Id.*

The Ninth Circuit assumed, without deciding, that Respondents could raise their First Amendment claims by seeking habeas corpus relief from a final order of deportation. Pet. App. 14a. The appeals court nonetheless held that such relief would not adequately protect Respondents' First Amendment rights: "*prompt* judicial review of [Respondents'] claims [is] required because violation of [Respondents'] First Amendment interests would amount to irreparable injury that `cannot be vindicated by post-deprivation remedies.'" Pet. App. 15a (emphasis in original) (quoting *American-Arab I*, Pet. App. 77a-128a).

With three judges dissenting, the Ninth Circuit denied the government's motion for rehearing with suggestion for rehearing en banc. Pet. App. 246a-247a. The dissenters would have held that § 1252(g) deprived the federal courts of jurisdiction to hear Respondents' claims. Pet. App. 247a-252a.

On June 1, 1998, this Court agreed to hear one of two issues presented by the government's certiorari petition. The Court agreed to consider whether the courts below had jurisdiction to hear Respondents' selective enforcement claims, but declined to consider the merits of those claims.

SUMMARY OF ARGUMENT

As amended by IIRIRA, the Immigration and Naturalization Act could not be clearer that the lower federal courts lack jurisdiction to entertain challenges to deportation proceedings prior to the entry of a final order of deportation. 8 U.S.C. § 1252(g) now states plainly that the lower federal courts have *no* jurisdiction to review INS actions other than as provided for in § 1252. While that section provides jurisdiction for review of *final* deportation orders, it does not permit federal-court challenges -- as here -- to on-going deportation proceedings.

The Ninth Circuit's conclusion that 8 U.S.C. § 1252(f) provides such jurisdiction is totally unfounded. Section 1252(f) -- as its title suggests -- is intended as a *limit* on federal jurisdiction, not (as the appeals court concluded) a significant expansion of jurisdiction. The appeals court's interpretation of § 1252(f) is totally implausible, and thus it was unwarranted in resorting to the doctrine that a statute should be construed, *if fairly possible*, so as to avoid potentially unconstitutional interpretations.

In any event, *amici*'s interpretation of § 1252(g) does not render that statute unconstitutional. As interpreted by *amici*, § 1252(g) still permits Respondents to obtain judicial review of their constitutional claims. It merely requires Respondents to exhaust their administrative remedies prior

to doing so. If, on review of a final order of deportation, there are any disputes over material facts, they can be resolved by resort to a remand to the district court pursuant to 28 U.S.C. § 2347(b)(3); and such disputes could also be resolved in connection with a habeas corpus petition. The Ninth Circuit's conclusion that vindication of Respondents' First Amendment rights requires that Respondents not be required to adhere to normal exhaustion requirements is unfounded. The First Amendment does not protect individuals from the expense and annoyance of litigation, which are among the costs of living under government.

Finally, *amici* believe that this case provides a stark example of the threat to national security that can arise if the Ninth Circuit's lax jurisdictional standards are adopted. Respondents stand accused of engaging in fundraising for the PFLP, one of the most violent and anti-American terrorist groups in the world today. When the elected branches of government determine (as here) that deportation proceedings should be initiated against terrorist fundraisers, national security demands that resolution of those proceedings not be delayed for more than a decade. Congress adopted IIRIRA in order to prevent such delays from occurring. If the courts ignore that congressional intent, they strip our nation of the power to take swift and decisive actions to combat international terrorists who threaten our national security.

ARGUMENT

I. IIRIRA DIVESTS FEDERAL COURTS OF ALL JURISDICTION TO HEAR CHALLENGES TO ON-GOING DEPORTATION PROCEEDINGS

As amended by IIRIRA, the Immigration and Naturalization Act could not be clearer that the lower federal courts lack jurisdiction to entertain challenges to deportation proceedings prior to the entry of a final order of deportation.

As amended by § 306(a) of IIRIRA, 8 U.S.C. § 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

The Ninth Circuit recognized that § 1252(g) applies retroactively to cases, such as Respondents', that were pending at the time that IIRIRA was adopted in 1996. Pet. App. 7a-8a. Respondents do not contest that theirs is a case that "aris[es] from the decision or action by the Attorney General to commence proceedings" to deport them. Thus, § 1252(g) unequivocally provides that "no court shall have jurisdiction" to hear Respondents' case "[e]xcept as provided" in § 1252.

The only subsection of § 1252 that Respondents and the Ninth Circuit have pointed to as a jurisdictional grant

allowing the federal courts to hear this case is § 1252(f)(1). Section 1252(f)(1) provides in full:

> **Limit on injunctive relief.** (1) In general. Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II [8 U.S.C. §§ 1221 *et seq.*], as amended by [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.[4]

The Ninth Circuit interpreted the final clause of § 1252(f)(1) as an affirmative grant of jurisdiction to the federal courts, and thus as one of the exceptions -- to § 1252(g)'s jurisdiction ban -- contemplated by the first clause of § 1252(g) ("[E]xcept as provided in this section . . ."). Pet. App. 10a-11a. Respondents endorse that interpretation. Respondents' Brief in Opposition to Certiorari ("Opp. Br.") at 14-15.

The Ninth Circuit's interpretation of § 1252(f)(1) is untenable. As the title of § 1252(f) states, that subsection is intended to "limit" federal court jurisdiction, not to expand it.[5] Section 1252(f) makes clear that *under no cir*

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[4] "[C]hapter 4 of title II" refers to statutory provisions governing inspection, apprehension, examination, exclusion, and removal of aliens. *See* 8 U.S.C. §§ 1221-1231.

[5] "`[T]he title of a statute and the heading of a section' are `tools

(continued...)

cumstances are federal courts to grant classwide injunctive relief against the operation of laws governing the inspection, apprehension, examination, exclusion, and removal of aliens, and at the same time acknowledges that there might be circumstances under which a court could entertain a request for injunctive relief against such operation as applied "to an individual alien." But acknowledging the *possibility* that injunctive relief on behalf of individual aliens might be proper in some instances[6] is a far cry from an affirmative grant of jurisdiction to provide such relief.

As Judge O'Scannlain stated in his dissent from the denial of rehearing en banc, "[S]ubsection (f) is not a grant of jurisdiction of any kind, but rather an additional restriction on jurisdiction . . . The exception within this subsection [relating to injunctive relief with respect to `an individual alien'] is clearly only an exception to this subsection." Pet. App. 249a n.1.

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[5](...continued)
available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1226 (1998) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)).

[6] *Amici*'s interpretation of § 1252(f)(1) does not render the final clause of that subsection meaningless. There clearly *are* instances in which Congress has bestowed jurisdiction on the federal courts to grant injunctive relief on behalf of individual aliens. For example, most final deportation orders are reviewable pursuant to 8 U.S.C. § 1252(a), and an injunction will often be the appropriate remedy for an improperly issued final deportation order. Section 1252(f)(1) makes clear that the scope of any such injunction must be limited to individual aliens and must not include classwide relief from enforcement of some aspect of the applicable immigration laws.

The Ninth Circuit's reading of § 1252(f) is implausible for the additional reason that it creates an exception so large as to swallow § 1252(g)'s rule prohibiting judicial review of nonfinal orders. Under the Ninth Circuit's reading, the federal courts have jurisdiction to grant an injunction to *every* alien seeking individual relief. Perhaps recognizing the implausibility of that construction, the appeals court sought to limit its holding to those seeking "judicial review of constitutional claims." Pet. App. 11a. But the court made no effort to tie its limitation to any specific language contained § 1252(f). Indeed, there is no such language; if Respondents are permitted to invoke federal court jurisdiction on the basis of § 1252(f), then so can any individual alien not seeking classwide relief and against whom inspection, apprehension, examination, exclusion, or removal proceedings have been initiated. In sum, the appeals court's reading is untenable; it is not plausible that Congress would adopted § 1252(g)'s jurisdiction-restricting language and then simultaneously adopt language in § 1252(f) that would to a large measure undercut the purposes § 1252(g).

The appeals court asserted that it arrived at its interpretation of § 1252(f) in order avoid the "`serious constitutional question[s] that would arise if a federal statute were construed to deny any forum for a colorable constitutional claim.'" Pet. App. 10a (quoting *Doe v. Webster*, 486 U.S. 592 (1988)). *Amici* discuss more fully below why the government's interpretation of § 1252 is not constitutionally suspect. In any event, in light of the absence of any significant ambiguity in the meaning of § 1252(f), there is no basis in this case for applying the doctrine that "`[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'"

Almendarez-Torres, 118 S. Ct. at 1228 (citing *United States v. Jim Fuey Moy*, 241 U.S. 394, 401 (1916)). That doctrine is applicable only when "the statute [is] genuinely susceptible to two constructions." *Id.* When, as here, a proffered statutory construction "is plainly contrary to the intent of Congress," there can be no justification for adopting that construction as a means of avoiding constitutional difficulties. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988).

The Ninth Circuit also justified its interpretation of § 1252(f) as necessary to give meaning to the first clause of § 1252(g) ("Except as provided in this section. . ."). The appeals court argued that that first clause would be meaningless unless the court could identify within § 1252 at least one exception to § 1252(g)'s jurisdictional bar. Pet. App. 9a. The court then hit upon § 1252(f) as the most likely "candidate" and construed it accordingly. *Id.* But in its search for an exception the court need not have looked any farther than § 1252(a), which provides jurisdiction in the federal appeals courts over most final deportation orders. Accordingly, the appeals court's desire to lend meaning to the first clause of § 1252(g) adds nothing to its interpretation of § 1252(f).

Respondents raise one additional argument in support of the Ninth Circuit's interpretation of § 1252(f). Respondents assert that the first clause of § 1252(g) exempts from its jurisdictional bar all exceptions to the bar "provided in this section [i.e., § 1252]." Opp. Br. 15 n.7. They further assert that even if the last clause of § 1252(f) is viewed as creating an exception to the jurisdictional bar rather than creating an affirmative source of jurisdiction, that exception

is sufficient to permit Respondents to "fall back on general federal jurisdiction, 28 U.S.C. § 1331, and on 8 U.S.C. § 1329, providing district court jurisdiction for actions arising under the INA." *Id.*

Respondents argument is based on a misreading of § 1252(f). The last clause of § 1252(f) is *not* an exception to § 1252(g)'s all-encompassing jurisdictional bar; rather, it is a limitation on the scope of § 1252(f)'s jurisdictional bar with respect to injunctive relief. Nothing in the last clause of § 1252(f) so much as suggests that Congress intended to create an exception from § 1252(g)'s general rule that § 1252 is to be the sole source of federal court jurisdiction over challenges to actions taken by the Attorney General in immigration-related matters.

In sum, 8 U.S.C. § 1252(g) expresses Congress's clear intent that there is no jurisdiction in the lower federal courts to entertain challenges to deportation proceedings prior to the entry of a final order of deportation. In the absence of such an order in this case, Respondents' case must be dismissed.

II. RESPONDENTS WILL BE ABLE TO DEVELOP AN ADEQUATE FACTUAL RECORD SHOULD THEY DECIDE TO SEEK REVIEW OF ANY FINAL ORDER OF DEPORTATION

As noted above, the Ninth Circuit justified its interpretation of § 1252(f) as an effort to avoid constitutional difficulties it saw in the government's interpretation. One of those "difficulties" was Respondents' alleged inability, in any appeal from a final deportation order, to develop a

factual record in support of their selective enforcement claim. Pet. App. 12a.

Amici agree with Respondents that they are entitled at some point to a judicial forum within which to raise their First Amendment claims.[7] But IIRIRA does not deny them such a forum; it requires Respondents to exhaust all administrative remedies before going into federal court, but ensures that they eventually will have their day in court on all claims. *See* 8 U.S.C. § 1252(a).

Respondents are correct that they will not be permitted to raise their selective enforcement claims in connection with administrative proceedings before the INS. But Respondents and the Ninth Circuit have failed to explain convincingly why 28 U.S.C. § 2347(b)(3) would not provide an adequate fact-finding forum for any disputed issues of material fact related to Respondents' constitutional claims. Section 2347(b)(3) permits transfer from the appeals court to the district court for resolution of material factual issues not addressed in the administrative record.[8] Thus, if a final

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[7] *But see Carlson v. Landon*, 342 U.S. 524, 537 & n.28 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.' . . . No judicial review is guaranteed by the Constitution.") (quoting *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290-91 (1904)).

[8] 28 U.S.C. § 2347(b) provides in pertinent part:

(b) When an agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall (continued...)

order of deportation is issued against Respondents and they seek review in a federal appeals court, any disputed issues of material fact not addressed in the administrative proceedings can be resolved by means of a transfer to a district court.

The Ninth Circuit held that 8 U.S.C. § 1252(b)(4)(A) precludes resort to § 2347(b)(3) transfers in immigration cases. Pet. App. 13a. Section 1252(b)(4)(A) provides that in cases seeking review of deportation orders, "the court of appeals shall decide the petition only on the administrative record on which the order of removal is based." But § 1252(b)(4) nonetheless appears to contemplate that the appeals court may consider issues not passed on in the administrative proceedings. For example, § 1252(b)(4)(C) provides that decisions of the Attorney General regarding admission to the United States can be overturned if "manifestly contrary to law." A deportation order issued in violation of an alien's constitutional rights would be manifestly contrary to law, and thus the appeals courts are empowered to employ whatever tools are necessary

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[8](...continued)
determine whether a hearing is required by law. After that determination, the court shall --

. . .

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented.

(including § 2347(b)(3)) to determine whether an alien's constitutional rights have been violated.

In any event, a decision permitting § 2347(b)(3) fact-finding in connection with judicial review of final orders of deportation would be far more faithful to congressional intent than the would the procedure permitted by the Ninth Circuit: an extra-statutory cause of action in the district court, filed while administrative proceedings are on-going. This is not to say that fact finding would necessarily be required in this case in connection with any appeal from a final order of deportation. *Amici* note, for example, that even in criminal cases the defendant must make an extraordinarily strong showing of selective enforcement before they are entitled to any discovery on the issue. *United States v. Armstrong*, 116 S. Ct. 1480 (1996). But should a genuine issue of material fact arise in connection with Respondents' constitutional claims, § 2347(b)(3) provides the method for resolution of those factual issues that is most consistent with congressional intent.

Finally, were the Court to find that § 2347(b)(3) were unavailable as a method by which an appeals court could resolve disputed issues of material fact, Respondents would nonetheless be entitled to press their constitutional claims in connection with an application for a writ of habeas corpus. Indeed, the Ninth Circuit accepted the possibility that Respondents could obtain complete review of their constitutional claims through habeas corpus review. Pet. App. 14a. The court said, however, that even if such review were available, it would not constitute a "satisfactory avenue for review" of Respondents' constitutional claims because it would not be sufficiently prompt. *Id.* at 14a-15a.

Given the Ninth Circuit's concession, its arguments regarding § 2347(b)(3) add nothing to Respondents' case.

Moreover, constitutional habeas corpus review quite clearly *is* available, should Respondents be found to lack an adequate means of seeking review of their constitutional claims in connection with a petition for review of a final deportation order. Article I, § 9, clause 2 of the Constitution protects the writ of habeas corpus from suspension except "when in Cases of Rebellion or Invasion the public Safety may require it." IIRIRA plainly does *not* suspend the availability of the Great Writ. The Court in *Felker v. Turpin*, 116 S. Ct. 2333 (1996), noted that it had had jurisdiction since at least 1789 to hear original habeas corpus petitions and that it therefore assumed that Congress would not repeal such jurisdiction by implication. *Felker*, 116 S. Ct. at 2337-39. In the absence of any language in IIRIRA stating that the Supreme Court does not have jurisdiction to entertain original habeas petition filed by those raising constitutional objections to a final order of deportation, it must be assumed that the Court still retains such jurisdiction. It may well be that § 1252(g) strips the lower federal courts of such jurisdiction (*see Yang v. Immigration and Naturalization Service*, 109 F.3d 1185, 1195-96 (7th Cir. 1997)), but original habeas corpus jurisdiction in the Supreme Court is still available.

In sum, even assuming that Respondents have a constitutional right to judicial review of their constitutional claims, they will have an opportunity for adequate judicial review of their claims if and when a final order of deportation is issued.

III. THE FIRST AMENDMENT DOES NOT REQUIRE THAT RESPONDENTS OBTAIN IMMEDIATE JUDICIAL REVIEW OF THEIR CONSTITUTIONAL CLAIMS

The Ninth Circuit also held that its interpretation of § 1252(f) was necessary in order to vindicate Respondents' alleged right to "prompt" review of their constitutional claims. Pet. App. 15a. It is not enough to allow judicial review following entry of a final order of deportation, the appeals court held, "because violation of [Respondents'] First Amendment interests would amount to irreparable injury that `cannot be vindicated by post-deprivation remedies.'" *Id.* (quoting *American-Arab I*, Pet. App. 77a-128a).

The Ninth Circuit cited no Supreme Court case law in support of its conclusion that "prompt" review is constitutionally mandated. That omission is unsurprising, given the absence of such authority.

The two Supreme Court decisions (*Younger v. Harris*, 401 U.S. 37 (1971), and *Freedman v. Maryland*, 380 U.S. 51 (1965)) cited by Respondents (Opp. Br. 15-16 n.9) do not support their claim to a right to immediate review of all First Amendment claims. *Freedman* involved an appeal by a criminal defendant who was convicted of violating a Maryland law that required individuals to submit motion pictures to the Maryland State Board of Censors for approval prior to exhibiting the film. The Court held that the law was an invalid prior restraint on free speech because the approval process contained insufficient safeguards to ensure that First Amendment rights would be respected. But the Court made clear that its ruling was limited to cases in

which the government sought to restrain speech *in advance* of judicial review. *Freedman*, 380 U.S. at 58-59. *Freedman* gives no indication that the First Amendment limits the power of government to subject individuals to administrative proceedings *after* the speech has been uttered, as is the case here.

The other case cited by Respondents, *Younger*, is actually supportive of the government's position. *Younger* held that federal courts virtually never should interfere with on-going state criminal prosecutions, even when the prosecution is alleged to chill the defendant's exercise of his First Amendment or other constitutional rights. *Younger*, 401 U.S. at 54. The Court stated, "[T]he existence of a `chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Id.* at 51.

The contrary rule announced by the Ninth Circuit would result in a major upheaval in established First Amendment law. For example, libel actions undoubtedly have some chilling effect on the exercise of First Amendment rights. Yet, the First Amendment has never been thought to protect a speaker from the time and expense of a full-fledged libel trial, even if the speaker believes that he can establish conclusively that none of the words he uttered were false. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Under the Ninth Circuit's theory, defendants would be entitled to summary disposition of all libel claims brought against them, without permitting the plaintiff an opportunity to establish his case through discovery, as well as immediate appeal from orders denying summary disposition.

The Court has established a very limited class of constitutional rights that require protection not only at the conclusion of judicial and/or administrative proceedings, but also at the outset of such proceedings. In *Abney v. United States*, 431 U.S. 651 (1977), the Court held that the Double Jeopardy Clause protects individuals against having to stand trial twice for the same crime, not merely against being twice punished. *Abney*, 431 U.S. at 661. Thus, a federal defendant whose motion to dismiss criminal charges on Double Jeopardy Clause grounds is denied, is entitled to appeal that denial immediately, without awaiting completion of a trial. *Id.* at 662. Similarly, the Speech or Debate Clause protects Congressmen from ever having to answer for their protected speech, and thus Congressmen are entitled to an immediate appeal from denial of a motion to dismiss a criminal indictment on Speech or Debate Clause grounds. *Helstocki v. Meanor*, 442 U.S. 500 (1979).

First Amendment rights have never been thought to fall within this extremely limited class of constitutional rights whose vindication requires immediate judicial review of claims that those rights have been violated. There is no constitutional right not to be forced into litigation over matters that arguably tread upon one's First Amendment rights. Unlike in cases involving claims under the Double Jeopardy Clause or the Speech or Debate Clause, this case does not involve "an asserted right the legal and practical value of which would be destroyed if not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860 (1978). As the Court explained, in denying a right to immediate appeal of Speedy Trial Clause claims:

> Admittedly there is value -- to all but the most unusual litigant -- in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial.

Id. at 860 n.7. There is nothing in the nature of First Amendment rights that renders them worthless if not vindicated before trial. Under such circumstances, requiring Respondents to exhaust their administrative remedies before raising their First Amendment claims in federal court does not constitute "irreparable harm" because the "expense and annoyance of litigation is part of the social burden of living under government." *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980).

Moreover, the pendency of deportation proceedings against Respondents is unlikely to chill their expressive activities to any appreciable degree. After Respondents engaged in the conduct at issue in this case, Congress adopted a law making it a criminal offense to raise funds for "foreign terrorist organizations," and the PFLP has now been designated as such an organization by the Secretary of State. *See* Antiterrorism and Effective Death Penalty Act of 1996, § 302(a), 8 U.S.C. § 1189(a); 62 Fed. Reg. 52,650 (Oct. 8, 1997) (Secretary of State's designation of PFLP and 29 other groups as "foreign terrorist organizations"). Accordingly, quite apart from the pendency of deportation proceedings, Respondents have very good reason to discontinue any fundraising on behalf of the PFLP.

Finally, placing First Amendment rights on a par with Double Jeopardy Clause and Speech or Debate Clause rights

would seriously erode the policies underlying exhaustion-of-remedies and no-interlocutory-appeals requirements. As the Court noted in *MacDonald,* double jeopardy claims are not easily made -- they require "at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense." *MacDonald,* 435 U.S. at 862. Speech or Debate Clause claims are similarly unusual, given the limited class of individuals who are eligible to invoke that clause. But First Amendment rights are far more easily asserted. Virtually all conduct has some arguably expressive component, and thus many litigants seeking to avoid sanction for their conduct can raise a colorable First Amendment defense. The Court in *MacDonald* cited the ease with which a constitutionally based defense could be raised (in that case, a claim under the Speedy Trial Clause) as one reason not to permit interlocutory appeal of denial of such claims. *Id.* Accordingly, the ease with which First Amendment claims could be raised in an effort to fight deportation counsels strongly against permitting collateral First Amendment attacks on ongoing deportation proceedings.

In sum, Respondents have failed to demonstrate why their First Amendment rights cannot be fully vindicated if they are required, like others required involuntarily to participate in judicial and/or administrative proceedings, to abide by the procedural rules established by Congress while seeking to assert those rights. This is not a case in which Respondents are being denied judicial review of their constitutional claims altogether; they are merely being asked to follow normal procedures in seeking such review. Such delays in final adjudication of constitutional rights "is one of the painful obligations of citizenship." *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 268 n.2 (1982)

(denying immediate appeal of denial of motion to dismiss indictment based on prosecutorial vindictiveness).

IV. THIS CASE PROVIDES A STARK EXAMPLE OF THE THREAT TO NATIONAL SECURITY THAT CAN ARISE IF THE APPEALS COURT'S LAX JURISDICTIONAL STANDARDS ARE ADOPTED

This case raises fundamental questions about the power of Congress and the Executive Branch to control the flow of aliens into this country and to protect American security interests by excluding those aliens deemed to represent a threat to American interests.

A decade has passed since the INS determined that Respondents' continued presence in this country represented a sufficient threat to national security to warrant initiation of deportation proceedings. Yet, due to the interference of the lower federal courts, the INS has been unable to go forward with those proceedings -- even though the courts have done no more than issue a "preliminary" finding that the administrative proceedings are improper. When the elected branches of government determine (as here) that deportation proceedings should be initiated against terrorist fundraisers, national security demands that resolution of those proceedings not be delayed for a decade or more. It is precisely by permitting collateral attacks on deportation proceedings -- attacks nowhere contemplated in the immigration laws -- that the federal courts contribute to unwarranted and security-impairing delays in the deportation process.

The courts must continue to be mindful that "every delay works to the advantage of the deportable alien who

wishes merely to remain in the United States." *Stone v. Immigration and Naturalization Service*, 514 U.S. 386 (1995). It was precisely to counter such delays that Congress adopted IIRIRA; the lower federal courts should be sent a clear message that IIRIRA does not countenance decades-long challenges to the mere institution of deportation proceedings.

Such a message would be especially appropriate in this case due to the particularly violent and anti-American nature of the PFLP. There are very few terrorist groups in the world today that pose as great a threat to American security as does the PFLP. If allowed to stand, the Ninth Circuit's decision is an open invitation to the PFLP to increase its American-based fundraising and to use those funds to increase activities that threaten American lives.

As the petition for certiorari indicates, the PFLP recently celebrated the 30th anniversary of its 1967 founding. It has long proclaimed the United States to be one of its principal enemies. Among its many acts of international terrorism, the PFLP has hijacked numerous planes, killed 16 Americans at Israel's Lod Airport, and assassinated the U.S. Ambassador to Lebanon in 1976. Pet. at 2.

One of the PFLP's best-known members was Venezuelan-born terrorist Illich Ramirez Sanchez, better known as "Carlos the Jackel." Carlos received his training from the PFLP and, acting under the auspices of the PFLP, masterminded the kidnapping of OPEC oil ministers in Vienna in 1975. *See,* "Kill the Jackel," Sunday Times of London (Dec. 14, 1997).

The PFLP has been bitterly opposed to the 1993 Oslo peace accords between Israel and the Palestinian Liberation Organization (PLO), has suspended its participation in the PLO, and has been engaged in terrorist activity designed to undermine those accords. It has been implicated in numerous drive-by shooting attacks on Israeli citizens in recent months. *See,* "Israel Arrests 10 Suspected PFLP Members Near Ramallah," Agence France-Presse (Dec. 5, 1997). It recently issued a statement denouncing United States "threats" against Iraq and calling on Arab nations to "defy" the U.S. and "stand up to the policies of Washington." *See,* "Palestinian Group Denounces `U.S. Threats' Against Baghdad," Agence France-Presse (Nov. 10, 1997).

Surely, given the PFLP's history, the federal government has a strong interest in protecting American national interests by doing all it can to deny funding to the PFLP. Respondents do not dispute that they provided such funding, nor do they dispute that they are well aware of the PFLP's bloody history and its avowed opposition to United States policies. The federal courts have no business providing a shield to those who fundraise in support of such terrorist activity. Regardless whether fundraisers personally support terrorist activity or whether (as Respondents claim) they merely support the terrorist group's nonviolent activities, such fundraisers are undeniably facilitating terrorist acts that threaten America's national security.

Amici recognize that the merits of Respondents' First Amendment claims are not now before the Court. Nonetheless, *amici* request that the Court bear in mind the significant national security implications of this case when determining whether Congress really intended to permit the kind of collateral review of administrative proceedings that

has resulted in more than a decade's delay in the conclusion of these proceedings.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

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